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Nos. 95-1084 and 95-1496

In the Supreme Court of the United States

OCTOBER TERM, 1995

STATE OF ALASKA, PETITIONER

v.

BRUCE BABBITT, SECRETARY OF THE INTERIOR, ET AL.

ALASKA FEDERATION OF NATIVES, CROSS-PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

DREW S. DAYS, III
Solicitor General
LOIS J. SCHIFFER
Assistant Attorney General
J. CAROL WILLIAMS
ELIZABETH ANN PETERSON
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

23 pp

QUESTION PRESENTED

Whether the court of appeals correctly concluded, on interlocutory appeal, that the subsistence fishing provisions of the Alaska National Interest Lands Conservation Act (ANILCA), 16 U.S.C. 3101 *et seq.*, which give a priority to subsistence fishing on "public lands," apply to fishing on some, but not all, navigable waters in Alaska.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Statement	2
Argument	10
Conclusion	19

TABLE OF AUTHORITIES

Cases:

Alaska v. *Babbitt*, 54 F.3d 549 (9th Cir. 1995)	9
Alaska Fish & Wildlife Fed'n v. *Alaska*, cert. denied, 116 S. Ct. 272 (1995)	9
Alaska State Legislature v. *Alaska*, cert. denied, 116 S. Ct. 68 (1995)	9
American Constr. Co. v. *Jacksonville, Tampa & Key West Ry.*, 148 U.S. 372 (1893)	13
Black v. *Cutter Laboratories*, 351 U.S. 292 (1956)	17
Bobby v. *Alaska*, 718 F. Supp. 764 (D. Alaska 1989)	5, 6
Brotherhood of Locomotive Firemen & Enginemen v. *Bangor & Aroostock R.R.*, 389 U.S. 327 (1967)	13
Cappaert v. *United States*, 426 U.S. 128 (1976)	12
Hamilton-Brown Shoe Co. v. *Wolf Bros. & Co.*, 240 U.S. 251 (1916)	13
Kenaitze Indian Tribe v. *Alaska*, 860 F.2d 312 (9th Cir. 1988), cert. denied, 491 U.S. 905 (1989)	6
Madison v. *Alaska Dep't of Fish & Game*, 696 P.2d 168 (Alaska 1985)	5
McDowell v. *Alaska*, 785 P.2d 1 (Alaska 1989)	6
Metropolitan Stevedore Co. v. *Rambo*, 115 S. Ct. 2144 (1995)	17
Totemoff v. *Alaska*, 905 P.2d 954 (Alaska 1995), petition for cert. pending, No. 95-1512	10, 16, 17, 18
Virginia Military Institute v. *United States*, 113 S. Ct. 2431 (1993)	13, 14

Statutes and regulation: Page

Alaska National Interest Lands Conservation Act,
16 U.S.C. 3101 *et seq.* 2, 4
16 U.S.C. 3101(a) 3
16 U.S.C. 3101(c) 3
16 U.S.C. 3102(1) 4
16 U.S.C. 3102(2) 3-4
16 U.S.C. 3102(3) 3
16 U.S.C. 3102(12) 4
16 U.S.C. 3112(1) 3
16 U.S.C. 3113 ..... 3, 5
16 U.S.C. 3114 ..... 3, 11
16 U.S.C. 3115 6
16 U.S.C. 3115(a) 4
16 U.S.C. 3115(c) 4
16 U.S.C. 3115(d) 4, 5
16 U.S.C. 3124 4
16 U.S.C. 410hh(9) 13
28 U.S.C. 1292(b) 3, 8, 14
50 C.F.R. 100.3(b) 6

Miscellaneous:

William J. Brennan, Jr., *Some Thoughts on the Supreme Court's Workload*, 66 Judicature 230 (1983) 14
55 Fed. Reg. (1990):
p. 27,114 6
p. 27,115 6
p. 27,118 6
57 Fed. Reg. (1992):
p. 22,940 6
p. 22,942 ..... 6, 11
61 Fed. Reg. 15,014 (1996) 15
Robert L. Stern, *et al.*, *Supreme Court Practice* (7th ed. 1993) 14

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OPINIONS BELOW

The amended opinion of the court of appeals (Pet. App. 1-24) is reported at 72 F.3d 698. The opinion

of the district court (Pet. Supp. App. 1-50) is unreported.[1]

JURISDICTION

The initial opinion of the court of appeals was filed on April 20, 1995, and a petition for rehearing was denied on August 8, 1995 (Pet. App. 55). Justice O'Connor extended the time for filing a petition for a writ of certiorari to and including December 6, 1995 (Pet. App. 56), and the State of Alaska filed a petition on that date (No. 95-892). On December 19, 1995, the court of appeals withdrew and replaced its opinion. The State accordingly withdrew its petition in No. 95-892 and, on January 5, 1996, filed a new petition for a writ of certiorari under the current docket number. The private petitioner filed a cross-petition on March 18, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

STATEMENT

Private respondents Katie John and other Native Alaskan entities sued the United States in the United States District Court for the District of Alaska under the Alaska National Interest Lands Conservation Act (ANILCA or the Act), 16 U.S.C. 3101 *et seq.* They sought to establish their right to engage in subsistence fishing at Batzulnetas, a traditional Native Alaskan fishing camp within the boundaries of the Wrangell-St. Elias National Park and Preserve. See Pet. Supp. App. 1-2, 22-27. The private respondents later named the State of Alaska as a defendant in that action. See *id.* at 26-27. The

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[1] The citations to "Pet. App." and "Pet. Supp. App." respectively refer to the appendix and supplemental appendix filed in No. 95-1084.

district court granted partial summary judgment to the private respondents on certain legal issues. See *id.* at 43-44. The district court certified that decision for interlocutory appeal under 28 U.S.C. 1292(b), and the court of appeals reversed the district court's decision, but on narrower grounds than the State had urged. See Pet. App. 1-24.

1. Congress enacted ANILCA to preserve "certain lands and waters in the State of Alaska that contain nationally significant natural, scenic, historic, archeological, geological, scientific, wilderness, cultural, recreational, and wildlife values." 16 U.S.C. 3101(a). Congress recognized that public lands in Alaska have special value in supporting "subsistence uses," which Congress defined to include "the customary and traditional uses by rural Alaska residents of wild, renewable resources for direct personal or family consumption." 16 U.S.C. 3113. Congress declared a federal policy "to cause the least adverse impact possible on rural residents who depend upon subsistence uses of the resources of [public] lands." 16 U.S.C. 3112(1).

ANILCA contains specific provisions to preserve "the opportunity for rural residents [of Alaska] engaged in a subsistence way of life to continue to do so." 16 U.S.C. 3101(c). Title VIII of ANILCA establishes a priority for "the taking on public lands of fish and wildlife for nonwasteful subsistence uses * * * over the taking on such lands of fish and wildlife for other purposes." 16 U.S.C. 3114. The Act defines "public lands" to mean (with certain exceptions) lands situated within Alaska that are "federal lands." 16 U.S.C. 3102(3). It defines "federal land" to mean "lands the title to which is in the United States," 16

U.S.C. 3102(2), and it defines "land" to mean "lands, waters, and interests therein," 16 U.S.C. 3102(1).

Title VIII of ANILCA authorizes the Secretaries of the Interior and Agriculture to "prescribe such regulations as are necessary and appropriate to carry out [their] responsibilities" under the Act. 16 U.S.C. 3124; see 16 U.S.C. 3102(12). Title VIII also directs the Secretaries to establish regional advisory councils to review and evaluate proposals for the subsistence use of fish and wildlife. 16 U.S.C. 3115(a). The Secretaries must consider the reports and recommendations of the regional advisory councils when exercising their "administrative authority over the public lands," 16 U.S.C. 3115(c), but they need not follow the recommendation of a regional council if they determine that the recommendation violates recognized principles of fish and wildlife conservation or "would be detrimental to the satisfaction of subsistence needs." *Ibid.*

In recognition of the State of Alaska's traditional responsibility for regulation of fish and wildlife in Alaska, Title VIII of ANILCA permits the establishment of an alternative state regulatory structure to protect subsistence use of public lands by rural Alaska residents. The Act provides that, if within one year of ANILCA's enactment, the State "enacts and . . . implements laws of general applicability which are consistent with, and which provide for the definition, preference, and participation specified in" ANILCA for rural residents, then the Secretary shall not implement the provisions of ANILCA directing the establishment of regional advisory councils. 16 U.S.C. 3115(d). Instead, the state laws, "unless and until repealed, shall supersede such sections [of

ANILCA] * * * for the taking of fish and wildlife on the public lands for subsistence uses." *Ibid.*

2. When ANILCA was enacted, both the State of Alaska and the federal government anticipated that the preference for subsistence uses of wild, renewable resources on public lands by rural residents would be administered by the State of Alaska pursuant to a state regulatory scheme. At the time, Alaska had already adopted a statute conforming generally to ANILCA's requirements for management of subsistence uses of fish and wildlife. See *Bobby* v. *Alaska*, 718 F. Supp. 764, 788-791 (D. Alaska 1989). That statute provided a priority for nonwasteful subsistence use of wild, renewable resources, but it did not limit the priority to "rural Alaska residents," as required by 16 U.S.C. 3113. The State therefore promulgated regulations recognizing that limitation. See *Bobby*, 718 F. Supp. at 767. On May 14, 1982, after the federal government's review and approval of the state regulatory scheme, the State became responsible for all regulation of subsistence use of wild, renewable resources under ANILCA. *Ibid.*

In 1985, the Alaska Supreme Court concluded that the State's regulations limiting the subsistence priority to rural Alaska residents were inconsistent with state statutory law. *Madison* v. *Alaska Dep't of Fish & Game*, 696 P.2d 168 (Alaska 1985). Without that eligibility limitation, the State's subsistence priority ceased to comply with ANILCA, and the Secretary of the Interior withdrew certification of the State's regulatory scheme, pending enactment of state subsistence legislation consistent with ANILCA. See *Bobby*, 718 F. Supp. at 768. The Alaska Legislature then amended the State's subsistence laws to remedy the inconsistency with ANILCA. See

ibid.; *Kenaitze Indian Tribe* v. *Alaska*, 860 F.2d 312, 314 (9th Cir. 1988), cert. denied, 491 U.S. 905 (1989).

In 1989, the Alaska Supreme Court concluded that the amended state subsistence statute violated Alaska's Constitution. See *McDowell* v. *Alaska*, 785 P.2d 1 (1989). The Alaska Supreme Court held that the state constitution prohibits the State from according a preference for the use of renewable resources on the basis of residency and that, because ANILCA expressly reserves the priority for "rural Alaska residents," the State could not conform its legislation to ANILCA without violating the constitutional ban. *Id.* at 6-9. As a result, the United States became obligated to implement ANILCA's subsistence requirements. See 16 U.S.C. 3115.

On June 29, 1990, the Department of the Interior and the Department of Agriculture jointly published temporary subsistence management regulations. See 55 Fed. Reg. 27,114. Among other things, the regulations provided that the priority for subsistence use on "public lands" does not apply to navigable waters. The Departments noted that "[t]he United States generally does not hold title to navigable waters and thus navigable waters generally are not included within the definition of public lands." *Id.* at 27,115; see *id.* at 27,118. The final regulations, which made no relevant change in the interpretation of the scope of federal authority, provided that the priority for subsistence use was limited to "all public lands including all non-navigable waters located on these lands." 50 C.F.R. 100.3(b). See 57 Fed. Reg. 22,940, 22,942 (1992).

3. On December 5, 1990, the private respondents in this case filed suit against the United States in federal district court challenging the exclusion of nav-

igable waters from the federal subsistence regulations. *Katie John* v. *United States*, No. A90-484-CV (HRH) (D. Alaska). The private respondents conducted traditional subsistence fishing at Batzulnetas, which is located within Wrangell-St. Elias National Park and Preserve in south-central Alaska. The fishing camp is located near the confluence of Tanada Creek and Copper River, which have been assumed to be navigable waterways for purposes of this litigation based on a determination by the National Park Service.[2] The plaintiffs sought to extend the priority for rural Alaska subsistence users to fishing at that location. The plaintiffs later joined the State of Alaska as a defendant on the ground that the State claimed general authority, apart from ANILCA, to regulate fishing at Batzulnetas. See Pet. Supp. App. 23-27; E.R. CR8 (private respondents' first amended complaint).[3]

At the time that the private respondents' suit against the United States was pending, Alaska brought a suit against federal officials that challenged the federal government's authority to implement the subsistence management program set out in the temporary federal regulations. *Alaska* v. *Lujan*, No. 92-264-CV (HRH) (D. Alaska). See E.R. CR1 (State's complaint for declaratory and injunctive relief). The district court consolidated Alaska's suit

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[2] Neither the Bureau of Land Management nor the courts have made formal navigability determinations with respect to those rivers.

[3] In 1985, before the Alaska Supreme Court's decision in *McDowell*, the private respondents had commenced litigation against the State of Alaska concerning the State's program for regulating subsistence fishing. The lawsuit at issue here is an outgrowth of that original litigation. See Pet. Supp. App. A24.

with the private respondents' suit, and it has managed those cases jointly with other pending litigation involving subsistence fishing issues. See Pet. App. 1-2.

After consulting with counsel, the district court determined that it should first decide two fundamental issues of law: "who is entitled to manage fish and game within Alaska for purposes of ANILCA, and where does ANILCA apply?" Pet. Supp. App. 2. The parties filed motions for partial summary judgment respecting those questions. In response, the district court ruled on the first issue that "the Secretary, not the State of Alaska, is entitled to manage fish and wildlife on public lands in Alaska for purposes of Title VIII of ANILCA," and it consequently denied the State's motion for partial summary judgment on that issue and dismissed that count of the complaint. *Id.* at 43. On the second issue, it ruled that, "[f]or purposes of Title VIII, 'public lands' includes all navigable waterways in Alaska," and it consequently granted the private respondents' motion for partial summary judgment. *Ibid.*[4]

4. The district court certified its order for interlocutory review under 28 U.S.C. 1292(b). The court of

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[4] At the outset of the litigation, the United States had defended the provisions of the federal regulations that excluded all navigable waters from the federal subsistence management program. At the time of the motions for partial summary judgment, the United States had concluded that the interpretation was not correct. It urged instead that at least some navigable waters—those that are subject to federal reserved rights—are subject to federal subsistence management. See Pet. App. 6. The district court did not reject that theory, but concluded that navigability by itself provided a better basis for determining the geographic scope of ANILCA in this case. See Pet. Supp. App. 33-34.

appeals granted leave for the State of Alaska and the United States to appeal, and a unanimous panel reversed the district court's rulings with respect to the geographic scope of ANILCA. *Alaska* v. *Babbitt*, 54 F.3d 549 (9th Cir. 1995). Based on its review of ANILCA's language and legislative history, the court of appeals had "no doubt that Congress intended that public lands include at least some navigable waters." *Id.* at 552 (footnote omitted). The court accordingly rejected the State's contention that all navigable waters in Alaska are exempt from regulation for subsistence use under ANILCA. But unlike the district court, it was unwilling to accept the private respondents' contention that ANILCA's subsistence priorities extended to all of Alaska's navigable waters. Instead, the court of appeals agreed with the United States' position, first taken in the district court (see note 4, *supra*), that ANILCA extends to "some navigable waters" and that the reserved water rights doctrine provides an appropriate basis for determining what waters are subject to federal subsistence management. 54 F.3d at 553-554.[5]

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[5] Alaska had also asked the court of appeals to review the district court's ruling that the United States, rather than Alaska, had authority to manage subsistence uses. Alaska ultimately dismissed its appeal on that issue with prejudice. The Alaska Legislature and a private organization attempted to intervene for the purpose of continuing the appeal, but the court of appeals rejected those motions. See 54 F.3d at 550 n.2. This Court denied petitions for a writ of certiorari arising from those attempts to intervene. See *Alaska State Legislature* v. *Alaska*, cert. denied, 116 S. Ct. 68 (1995) (No. 94-1976); *Alaska Fish & Wildlife Fed'n* v. *Alaska*, cert. denied, 116 U.S. 272 (1995) (No. 94-1829).

On December 6, 1995, the State of Alaska filed a petition for a writ of certiorari requesting review of the court of appeals' decision respecting the geographic scope of ANILCA. *Alaska* v. *Babbitt*, No. 95-892. On December 19, 1995, the court of appeals withdrew its original unanimous decision and reissued it as a majority opinion, accompanied by a dissenting opinion of Judge Hall. Alaska then withdrew its petition in No. 95-892 and substituted the current petition, which reflects Judge Hall's change of view. See Pet. App. 1-14 (majority opinion); *id.* at 15-24 (Hall, J., dissenting).

ARGUMENT

The court of appeals properly concluded that ANILCA's provision of a priority for subsistence fishing applies to some, but not all, navigable waters within Alaska. That decision, which was issued on interlocutory appeal, does not warrant this Court's review. The decision does not have any significance outside of Alaska, and it involves an issue that is the current subject of a new federal rulemaking proceeding. Contrary to Alaska's urgings, the court of appeals' decision does not conflict with the Alaska Supreme Court's decision in *Totemoff* v. *Alaska*, 905 P.2d 954 (1995). Moreover, as the court of appeals recognized, the questions of whether, and to what extent, the United States or Alaska is responsible for regulating subsistence fishing in navigable waters is intertwined with policy issues that should be addressed in the first instance through the administrative and political fora.

1. ANILCA expressly provides that "the taking on public lands of fish and wildlife for nonwasteful subsistence uses shall be accorded priority over the

taking on such lands of fish and wildlife for other purposes." 16 U.S.C. 3114. The specific question in this case is whether that priority applies to a taking of fish from a fish camp at Batzulnetas, which is located at the confluence of Tanada Creek and Copper River within the boundaries of the Wrangell-St. Elias National Park and Preserve. The private respondents sought to establish their right to a subsistence priority at that location in the face of federal regulations that dictated a contrary result. Those regulations would have precluded a subsistence priority at that location on the theory that the fish are taken from navigable waters and that such waters are categorically excluded from "public lands" within the meaning of ANILCA. See 57 Fed. Reg. 22,942 (1992).

Alaska argues, in accordance with those regulations, that ANILCA's subsistence priority can never apply to navigable waters. See 95-1084 Pet. 15-21. However, the United States determined in the course of responding to the private respondents' motion for summary judgment that the theory put forward in the regulations cannot be reconciled with the text of ANILCA itself. Both the district court and the court of appeals agreed that the regulations' categorical exclusion of all navigable waters is untenable. As the court of appeals explained:

> ANILCA's language and legislative history indicate clearly that Congress spoke to the precise question of whether *some* navigable waters may be public lands. They clearly indicate that subsistence uses include subsistence fishing. *See e.g.*, 16 U.S.C. § 3113. And subsistence fishing has traditionally taken place in navigable waters. Thus, we have no doubt that Congress

> intended that public lands include at least some navigable waters.

Pet. App. 8. The dissenting judge concurred in that conclusion. See *id.* at 18 ("I agree with the majority that Congress, in order to achieve its stated purpose, must have intended *some* navigable waters to fall under ANILCA.") (Hall, J., dissenting).

Although the district court and the court of appeals agreed that the federal regulations were inconsistent with ANILCA, they disagreed on the appropriate principle for determining which navigable waters are subject to ANILCA's subsistence priority. The private petitioner advances the view set out in the district court's decision, which held that the subsistence priority should apply to *all* navigable waters in Alaska. 95-1496 Pet. 7-16; see Pet. Supp. App. 34-43. The court of appeals concluded, however, that the subsistence priority should apply to only those navigable waters that are subject to federal reserved water rights. See Pet. App. 12-13. Under the court of appeals' rationale, the ANILCA subsistence priority would generally be applicable to fishing activities within the boundaries of federal reservations that were set aside with the explicit or implicit understanding that the use of the waters was needed to accomplish the purposes of the reservation. See *id.* at 11 (citing *Cappaert* v. *United States*, 426 U.S. 128, 138 (1976)). But the court left it to the relevant federal agencies to determine precisely "which navigable waters are public lands subject to federal subsistence management." Pet. App. 13.

The fishing location at issue in this case, for example, is within the Wrangell-St. Elias National Park and Preserve, which was established for the

purpose, *inter alia*, "to protect habitat for, and populations of, fish and wildlife," and specifically provides that "[s]ubsistence uses by local residents shall be permitted in the park, where such uses are traditional, in accordance with [Title VIII of ANILCA]." 16 U.S.C. 410hh(9). Relying on that statutory text, the district court concluded that, "[a]pplying the *Cappaert* analysis, it is clear that an unquantified amount of water appurtenant to the park was reserved for the purpose of providing rural Alaskans with the opportunity to pursue their subsistence rights under Title VIII." Pet. Supp. App. 33. The court of appeals, however, has not yet addressed the question whether the subsistence priority applies to the location at issue in this case.

2. There is no warrant for this Court to review that interlocutory ruling at the request of Alaska or the private petitioner. This Court has long followed the practice of declining to "issue a writ of *certiorari* to review a decree of the Circuit Court of Appeals on appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause." *American Constr. Co.* v. *Jacksonville, Tampa & Key West Ry.*, 148 U.S. 372, 384 (1893). See, *e.g.*, *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & Aroostock R.R.*, 389 U.S. 327, 328 (1967); *Virginia Military Institute* v. *United States*, 113 S. Ct. 2431 (1993) (Scalia, J., concurring in the denial of certiorari). This case does not present any "extraordinary" circumstances mandating immediate review, and the lack of finality "of itself alone" accordingly provides a sufficient basis for denial of the petition for a writ of certiorari. *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916). See

generally Robert L. Stern, *et al.*, *Supreme Court Practice* 195-199 (7th ed. 1993).

a. The court of appeals' decision in this case does not finally resolve the geographic scope of ANILCA's provisions granting a priority to subsistence fishing. The court's interlocutory decision has not definitively resolved any legal rights, including the private respondents' subsistence rights at the particular location at issue in this case. The district court specifically certified for interlocutory appeal under 28 U.S.C. 1292(b) its ruling that ANILCA's subsistence priority applies to *all* navigable waters. By doing so, it necessarily reserved decision on unresolved claims and defenses and preserved its right to reconsider any past rulings (including the existence of reserved water rights in the Wrangell-St. Elias National Park and Preserve) before entry of a final judgment. The district court's final resolution of all matters in the litigation (and the court of appeals' later review of those matters) could substantially affect the need for this Court to address the issue presented here. In keeping with the public interest in the Court's orderly management of its docket, it should not resolve whether to grant review in this case until all issues in the case have been decided. See *Virginia Military Institute*, 113 S. Ct. at 2431 (Scalia, J., concurring in denial of certiorari); cf. William J. Brennan, Jr., *Some Thoughts on the Supreme Court's Workload*, 66 Judicature 230, 231-232 (1983).

b. This case does not present any "extraordinary" circumstances dictating a need for immediate review. Contrary to the arguments of Alaska and its amici, this case does not present any issue of importance outside of the State of Alaska. The court of appeals expressly stated that its interpretation would

not affect "navigable waters elsewhere" because "ANILCA applies only to Alaska." Pet. App. 8 n.9. And even within Alaska, the consequences of the decision are uncertain. Under the court of appeals' interlocutory ruling, the resolution of specific disputes concerning whether the subsistence fishing priority applies to specific activities within federal reservations will depend on either a determination by the relevant federal agencies of "which navigable waters are public lands subject to subsistence management" (*id.* at 13) or additional litigation. The Department of the Interior recently issued an advance notice of proposed rulemaking, including preliminary regulatory text, for public comment. See 61 Fed. Reg. 15,014 (Apr. 4, 1996). Alaska, the private cross-petitioner, and the private respondents are expected to participate in the formulation of the final regulations, which are likely to have a direct bearing on the precise contours and practical importance of the issues involved in this case. And those regulations will, of course, be subject to judicial review.[6]

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[6] Alaska is incorrect in asserting (95-1084 Pet. 9-13) that this case presents a conflict between federal and state regulations. Alaska's petition is replete with speculation regarding "potential" and "likely" scenarios, but there is no sound basis to believe at this point that the final federal regulations will be incompatible with the State's regulatory programs. Indeed, past experience indicates that federal and state authorities are able to manage wildlife cooperatively. For example, Alaska notes (*id.* at 11 n.4) that the State's hunting regulations differ from hunting regulations that the federal government has applied to public lands. But the State has failed to establish that those differences have resulted in any significant conflict in the actual administration of hunting regulations on public lands.

c. Far from presenting "extraordinary" circumstances justifying interlocutory review, the court of appeals' decision does not even satisfy the Court's normal certiorari criteria. The court of appeals' decision does not conflict with any decision of this Court or another court of appeals. And contrary to Alaska's contentions (95-1084 Pet. 8-13), it does not conflict with the Alaska Supreme Court's interlocutory decision in *Totemoff* v. *Alaska*, 905 P.2d 954 (1995) (*reproduced at* Pet. App. 25-54), petition for certiorari pending, No. 95-1512 (filed Mar. 19, 1996). Alaska's assertion of a "jurisdictional crisis" (95-1084 Pet. 8) is unfounded.

In *Totemoff*, the State of Alaska prosecuted a rural hunter for locating and shooting a deer at night through the use of a spotlight. The hunter shined his spotlight and fired his gun from a boat in Prince William Sound while the deer stood on a federally owned island. 905 P.2d at 957. The defendant contended that he was engaged in "customary and traditional" subsistence hunting practices and that ANILCA therefore preempted a state regulation prohibiting hunting with a spotlight. The state supreme court rejected that claim, explaining that Alaska retains its authority to enforce its hunting regulations on federal lands except to the extent that there is an actual conflict between federal and state regulation. *Id.* at 958-960. It concluded that there was no conflict between ANILCA's federal subsistence program and the State's anti-spotlighting regulation. See *id.* at 960-961.

The state supreme court's conclusion that ANILCA did not preempt the state regulation resolved the defendant's preemption claim. The court nevertheless additionally opined that even if ANILCA

generally preempted the State's anti-spotlighting regulation, it would not do so in this case because the defendant engaged in spotlighting while on a boat in navigable marine waters and was therefore outside of ANILCA's geographic reach. 905 P.2d at 961-968. In discussing that matter, the state supreme court took issue with the court of appeals' decision in this case. See *id.* at 962-968. That extended discussion, however, was entirely unnecessary in light of the court's preemption ruling.[7] The state supreme court's obiter dicta provides no basis for Alaska to assert a conflict between the court of appeals and the state supreme court. See *Metropolitan Stevedore Co.* v. *Rambo*, 115 S. Ct. 2144, 2149 (1995) ("Breath spent repeating dicta does not infuse it with life."); *Black* v. *Cutter Laboratories*, 351 U.S. 292, 297 (1956) ("This Court * * * reviews judgments, not statements in opinions.").[8]

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[7] The state supreme court implicitly acknowledged that its discussion was dicta, stating:

> We *hold* that ANILCA does not protect the use of a spotlight as a customary and traditional method of subsistence hunting, and thus there is no actual conflict between ANILCA and Alaska law. * * * * * *Even if* ANILCA does protect customary and traditional means and methods, thereby preempting state enforcement of the anti-spotlighting regulation against Totemoff on federal land, the State still has criminal jurisdiction if ANILCA does not apply to the navigable waters from which Totemoff shined his spotlight at the deer.

905 P.2d at 961 (emphasis added).

[8] Even if the discussion in *Totemoff* were holding rather than dictum, the case would not present an occasion for this Court's review. The Alaska Supreme Court reversed and remanded the defendant's conviction on independent state grounds, directing the lower court to allow "for development

d. Not only are there no sound reasons to grant certiorari, but there are compelling prudential considerations that weigh against review. Alaska contends that the question whether the federal government or the State should be responsible for regulating subsistence fishing in navigable waters presents a policy issue of considerable importance to the State. See 95-1084 Pet. 3. But that contention simply underscores that this Court should expect the parties to afford the pending rulemaking proceeding an opportunity to resolve various issues and, if necessary, to exhaust the political processes before asking the Court to resolve the issue. As the court of appeals explained, the issue presented here—if it is not ultimately resolved in a satisfactory manner through the pending rulemaking process—"cries out for a legislative, not a judicial, solution." Pet. App. 13. Furthermore, the issue here could be resolved through legislative action by *either* Alaska or Congress. As the court of appeals observed:

> If the Alaska Legislature were to amend the state constitution or otherwise comply with ANILCA's rural subsistence priority, the state could resume management of subsistence uses on public lands including navigable waters. * * * If Congress were to amend ANILCA, it could clarify both the definition of public lands and its intent. Only legislative action by Alaska or Congress will truly resolve the problem.

Id. at 13-14. See also *id.* at 23 (Hall, J., dissenting).

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of the record relevant to Totemoff's procedural challenge to the spotlighting ban." 905 P.2d at 973. Hence, the *Totemoff* decision is itself interlocutory.

It is unclear, of course, whether Alaska or Congress will take the actions suggested by the court of appeals. But in light of the interlocutory nature of the court of appeals' decision, the pendency of a federal rulemaking, the opportunities for cooperative resource management by federal and state authorities, and the absence of a conflict between the court of appeals and the Alaska Supreme Court, there are compelling grounds to deny review in the hope that the parties will reach an accommodation through the administrative or political processes. If those efforts are unavailing, then the litigation will continue and the parties will have another opportunity to petition this Court for review. At that point, moreover, the issues would be presented to this Court in a more concrete context.

CONCLUSION

The petition and cross-petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General
LOIS J. SCHIFFER
Assistant Attorney General
J. CAROL WILLIAMS
ELIZABETH ANN PETERSON
Attorneys

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